IN THE

Supreme Court of the United States

October Term, 1950

No. 146

ALABAMA PUBLIC SERVICE COMMISSION, ET. AL., *Appellants*,

v.

SOUTHERN RAILWAY COMPANY, *Appellee*.

BRIEF FOR SOUTHERN RAILWAY COMPANY.

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OPINION BELOW.

The opinion of the specially constituted three-judge United States District Court, for the Middle District of Alabama, Northern Division thereof (No. 645-N), appears in the record at pages 63-69, and is reported in 88 F. Supp. 441. The final decree appears at pages 69-70 of the record.

The report and order of the Alabama Public Service Commission, which gave rise to the proceedings in the District Court, appear at pages 55-63 of the record.

A chronological history of the litigation is submitted herewith as Appendix C, pages 38-41.

JURISDICTION.

This is a direct appeal authorized under the Act approved June 25, 1948, effective September 1, 1948, Title 28, U. S. Code, Section 1253.

The suit was brought in the district court under the provisions of the Act of June 25, 1948: 28 U. S. C., Sections 1331; 1332, 2281, and 2284.

STATUTES INVOLVED.

28 U. S. C., Sections 1253, 1331, 1332, 2281, 2283, and 2284.*

Alabama Code 1940, Title 48, Sections 17, 79, 81, 82, 84, 85, 86, 87, 88, 89, and 106.*

Constitution of the United States, Amendment XIV, Section 1, and Commerce Clause Article I, Section 8, Clause 3.

STATEMENT OF THE CASE.

September 13, 1948, Southern Railway Company filed a petition (R. 14) in compliance with the requirement of Alabama statutes, Title 48, Section 106, Code of 1940, with Alabama Public Service Commission (Docket No. 12221), seeking authority to discontinue operation of two passenger trains Nos. 11 and 16 which it had for many years operated daily between Birmingham, Ala., and Columbus, Miss., in so far as their operation took place within the State of Alabama, to-wit, 113 miles in each direction.[1]

The ground for this application was the disparity between revenues and costs of operation because of small public patronage due to motor car operation, public and private, over improved highways—showing the lack of public need for such rail service. The petition recited that

* Set out in Appendix A, pages 34-35, and Appendix B, pages 35-38.

[1] The operation in Mississippi was between Steens and Columbus, a distance of about 10 miles. These trains not having been established in compliance with any order of Mississippi Railroad Commission, it was unnecessary for railway to seek authority from Mississippi Railroad Commission to discontinue their operation.

the wages of the crews, and payroll taxes thereon for the benefit of the crews, and train fuel consumed, approximated the total gross revenues from the trains' operations, and with other direct expenses considered, the direct costs alone exceeded the total revenues by over $5,000 per month. (R. 18.) No action was taken by the Commission on this petition for over one year.

October 26, 1949, these trains were discontinued in compliance with Service Order No. 843, issued by Interstate Commerce Commission, October 21, 1949, to all railroads to reduce their coal-burning passenger locomotive miles twenty-five per cent to meet the locomotive fuel shortage due to a strike in the coal industry (R. 19).

November 10, 1949, Southern Railway filed its supplemental petition with Alabama Public Service Commission seeking authority from it not to restore operation of these trains (R. 21) and representing to the Commission therein that in their continued operation the disparity between total revenues and direct costs had widened to over $9,000 per month (R. 25).

Southern Railway advised Alabama Public Service Commission that six other trains, which it had discontinued under Service Order 843, would be restored on November 21 (R. 28). That was the effective date of revocation of Service Order No. 843. And the Railway urged a hearing on its supplemental petition not to restore trains 11 and 16. Alabama Commission advised the Railway that a hearing on the original and supplemental petitions (Docket 12221) had been assigned for Fayette, Ala., December 8, 1949, but would not be held unless trains 11 and 16 were restored.

November 22, 1949, Alabama Commission issued its order (Docket 12225) citing Southern Railway to show cause why trains 11 and 16 should not be restored (R. 31). Southern appeared in response to the citation, and offered evidence which was rejected (R. 6, 7). On December 5, 1949, the Commission entered its order (Docket 12225) commanding Southern to restore operation, calling its attention to the penalties provided under state statute for noncompliance,

and providing therein that unless Southern purged itself of the alleged contempt it would be optional with the Commission whether it would hear the original and supplemental petitions at Fayette, Ala., on December 8 (R. 33).

December 6, 1949, Southern filed its bill in United States District Court. On that date the court entered its order temporarily restraining the Commission and the Attorney General from compelling restoration of the trains (R. 40).

December 8, 1949, the original and supplemental petitions (Docket 12221) were heard before the Commission at Fayette, Ala. On January 9, 1950, the Alabama Commission entered its report and order in said docket denying the applications to discontinue operation (R. 55).

The hearing on the bill for temporary and permanent injunction was set for hearing before the three-judge district court on December 15 (R. 42). At the request of defendants it was reassigned to January 9, 1950, and to January 12, on which date it was heard.[2] Final decree was entered February 13, 1950, permanently enjoining the Commission, its members, and the Attorney General from taking any proceedings to enforce the provisions of the Commission's orders of December 5, 1949, or January 9, 1950, or any penalties or other remedies against the plaintiff, its officers, agents, or employees, account failure to observe said orders, or either of them, by failure to restore said trains (R. 69). That is the decree from which defendants below take their appeal to this Court.[3]

ARGUMENT.

In their brief appellants argue three points: I. A federal court should decline to enjoin enforcement of the criminal laws of the State of Alabama. II. The three-judge federal district court had no jurisdiction of this cause. III. The

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[2] In the meantime the Interstate Commerce Commission issued Service Order No. 845 calling on all railroads to curtail coal-burning passenger locomotive miles 33⅓ per cent effective January 5 to March 8, 1950, unless sooner revoked.

[3] A full chronological history is shown in Appendix C hereto.

federal courts should abstain from exercising jurisdiction of matters properly decided by state courts. We address our argument to those three points, in order, treating all others not argued in the brief as waived by appellants.[4]

I.

Appellants' Contention Here that the United States Court Should Not Enjoin Enforcement of the Criminal Laws of the State of Alabama, is Unsound and Without Merit.

We submit the district court properly exercised its jurisdiction in the case at bar and entered its decree permanently enjoining the defendants as prayed in the complaint, as amended. It was necessary under the Alabama statutes for appellee to file its application with the Alabama Commission for authority to discontinue operation of these two trains. Appellee does not challenge that requirement. The Commission, before hearing the application and the supplemental application, preemptorily ordered appellee to restore operation, which had been discontinued in compliance with an order of the Interstate Commerce Commission. Under the Alabama statutes the orders of the Public Service Commission are not self-executing, resort to the courts is necessary and, in the main, enforcement is provided by the Alabama statutes in the way of penalty provisions: Title 48, Alabama Code 1940, Sections 110, 399, 400, 405, and others.

These penalties have never been collected so far as we can find from a search of precedents in Alabama by criminal proceedings upon indictment and information but have been collected solely by civil procedures. *State* v. *Western Union Telegraph Co.*, 208 Ala. 228, 94 So. 466. *Alabama Public Service Commission* v. *Western Union Telegraph Co.*, 208 Ala. 243, 94 So. 472. The language of

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[4] *Flournoy* v. *Wiener*, 321 U. S. 253, 261 (1944). *Uric* v. *Thompson*, 337 U. S. 163, 196 (1949).

the statute contemplates this result, Section 51, Title 48, Code of Alabama, 1940.[5]

Sections 400 and 405 run against officers, agents, or employees of the railroad. Section 399 runs against both the railroad and its officers, agents, or employees. Section 110 provides for penalty solely against the railroad for a violation of the Commission's orders.[6] This shows the extent to which the state has gone by providing a penalty to cover anything possibly overlooked.

We submit that the penalties designed by the state to compel compliance with orders of its Public Service Commission are not criminal statutes in the common acceptation of the word. They are, at best, mere quasi-penal statutes. They are more remedial than penal.[7] Certainly reference therein to "misdemeanor" which might be taken to contemplate imprisonment in the common jail, as distinguished from "felony" where imprisonment is to be in the state penitentiary, could not be held applicable to a transportation company such as the appellee here. Appellee could not be imprisoned in the common jail. Hence the only method of penalty compulsion is by so-called penalty statutes, that is to say, by a fine assessed against the transportation company for non-compliance with the Commission's order. This, therefore, does not present a case of enjoining the

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[5] Title 48, § 51, Code of Alabama, 1940, provides:

"*Actions to enforce penalties or forfeitures.*—Unless otherwise in this title provided, all actions to enforce penalties or forfeitures under this title shall be brought in the name of the State of Alabama in a court of competent jurisdiction in Montgomery county, Alabama. Whenever any utility is subject to a penalty or forfeiture under this title, the commission shall certify the facts to the attorney general, who shall institute and prosecute an action for recovery of such penalty; provided, the commission may compromise such action and dismiss the same on such terms as the court will approve. All penalties and forfeitures recovered by the state in such actions shall be paid into the treasury to the credit of the general fund."

[6] Section 110:

"* * * any transportation company that shall fail, refuse, omit or neglect to obey any lawful order or requirement of the public service commission, for which a penalty has not been provided, shall forfeit to the State of Alabama a sum not exceeding two thousand dollars for each offense, to be fixed by the court or judge trying the case, and every such violation, failure, refusal, neglect, or omission, shall constitute a separate and distinct offense, and, in case of a continuing violation, each and every day's continuance thereof shall be a separate and distinct offense."

[7] *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 17 (1904).

prosecution of the criminal laws of the state as criminal laws are generally understood, but merely of money judgments for continuous penalties.

Upon denial of its application to discontinue these trains appellee was confronted with two courses: Comply by restoring the operation of the trains, or, failing to do that, suffer the penalties of the Alabama statutes. In the one instance the loss from operation already was large and was growing larger; in the other the amounts of the numerous penalties were large and each day was by statute made a separate offense. Furthermore, in so far as the sections run against the officers, agents, or employees of appellee, we stress the fact that such persons are engaged in the public service of operating a railroad in the public interest. Interference with them in the performance of their duties would obviously handicap the conduct of appellee in performing its duty in the public service. Whether the financial loss is viewed from the standpoint of losses of operation or the large and increasing penalties, appellee's property would be taken upon its failure to comply with the Commission's order in violation of the guarantees contained in the Fourteenth Amendment to the Constitution of the United States and subject appellee, its officers, agents, and employees, to a multiplicity of suits.

In *St. Louis, S. F. Ry. Co.* v. *Alabama Public Service Commission*, 279 U. S. 560 (1929), this Court considered an appeal from a three-judge district court from the same Middle District of Alabama as in the case at bar. In that case the railway had discontinued operation of two interstate passenger trains without preliminary authority therefor from the state commission. A restraining order was issued upon the filing of the bill and was continued in force pending the appeal whereunder the state authorities were enjoined from the commencement of proceedings to enforce the penalties prescribed in the state statutes,—the same state statutes as in the case at bar. Injunction was denied, but the restraining order was continued in effect, and so, even after this Court vacated the decree and remanded the

case to the lower court. The opinion concluded with the statement that if after hearing, the state commission should insist that the service be restored, further proceedings appropriate to the situation might be had in the cause in the district court. This case has never been over-ruled.

In No. 395, October Term, 1950, *Alabama Public Service Commission, et al.* v. *Southern Railway Company,* a companion case to the case at bar, a three-judge court passed upon this same contention of appellants. *Southern Railway Company* v. *Alabama Public Service Commission,* 91 F. Supp. 980. At page 986, Judge Lynne, delivering the unanimous opinion of the District Court, said:

> "Equally tenuous is defendants' contention that the injunction prayed for would restrain enforcement of the criminal laws of Alabama in an unwarranted manner. To impart reality to the protection afforded plaintiff by the Fourteenth Amendment it is essential that this court restrain defendants from seeking to impose the sanctions of fines, penalties and forfeitures provided in Title 48, Code of Alabama 1940. We are without jurisdiction to grant the relief which the Commission wrongfully withheld, namely, permission for plaintiff to abandon these train services. We are warranted in assuming that should we decline to interfere with the enforcement of the criminal laws of Alabama plaintiff would continue to operate these trains at a serious and growing loss, for while the threat of prosecution may be a goad, it is not the only inducement to law observance."

In the opinion Judge Lynne distinguished *Beal* v. *Missouri Pacific R. Co.*, 312 U. S. 45 (1941), heavily relied upon by the Alabama Commission, pointing out that in the *Southern Railway case* (No. 395), there was no waiver of multiplicity of suits as there was in the *Beal case*. So it is in the case at bar, appellee has alleged multiplicity of suits from which it appropriately seeks injunctive relief. After thus distinguishing the *Beal case*, Judge Lynne stated the view of the three-judge court on the point in question as follows (91 F. Supp. at 987):

"We hold that this case falls within the exception to the general rule and find apposite the following language in Cline v. Frink Dairy Co. (1927), 274 U. S. 445, 47 S. Ct. 681, 682, 71 L. Ed. 1146: '* * * The general rule is that a court of equity is without jurisdiction to restrain criminal proceedings to try the same right that is in issue before it; but an exception to this rule exists when the prevention of such prosecutions under alleged unconstitutional enactments is essential to the safeguarding of rights of property, and when the circumstances are exceptional and the danger of irreparable loss is both great and immediate. * * *,'" (Authorities omitted).[8]

Three-judge federal courts have unhesitatingly granted injunctive relief against state penalties designed to enforce compliance with the orders of state regulatory commissions in those cases where they have determined such orders violated constitutional guarantees. Some of the more recent decisions are listed in Appendix D hereto.

If appellee is not entitled to injunctive relief against the enforcement of the threatened penalties under the Alabama statutes then it has no remedy by which to seek protection from invasion of its constitutional rights. Even if it is entitled to supersedeas under the statutes of Alabama, whether Section 81 or Section 84 of Title 48, such supersedeas would merely postpone the evil day so far as payment is concerned. The supersedeas provided under Alabama statutes is in no sense a guarantee of immunity from the accrual of penalties during the period of appeal, but simply gives to the state additional security for the collection of such penalties as were continuously accruing under the theory of appellants.

The authorities cited by appellants in support of this, their Point I, do not support appellants contention. *Beal* v. *Missouri Pacific*, 312 U. S. 45 (1941), was a suit by a

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[8] *Fenner* v. *Boykin*, 271 U. S. 240, 243. *Packard* v. *Banton*, 264 U. S. 140. *Hygrade* v. *Sherman*, 266 U. S. 497, 502. *Terrace* v. *Thompson*, 263 U. S. 197, 214. *Ex Parte Young*, 209 U. S. 123. *Davis* v. *Los Angeles*, 189 U. S. 207, 218. *Dobbins* v. *Los Angeles*, 195 U. S. 223, 236. *In re Sawyer*, 124 U. S. 200, 209.

railroad to enjoin a county attorney from prosecuting plaintiffs agents for criminal violations of the Nebraska full train crew law. The district court found only one suit was contemplated. This Court could not say that one suit threatened irreparable injury. We quote in the footnote below.[9] From the foregoing it thus clearly appears that the issue of irreparable injury from a threatened multiplicity of suits was waived. In the case at bar multiplicity of suits is one of the grounds for relief set forth in paragraph 17 of the complaint, and not waived.

Watson v. *Buck*, 313 U. S. 387 (1941), is different from the instant case in that the complainants there by seeking to enjoin the enforcement of two entire acts containing many separate and distinct regulations, commands and prohibitions, were asking the court to pass on the constitutionality of separate phases of the comprehensive statute before it was faced with cases involving particular provisions as specifically applied to persons who claim to be injured. There was no threat of prosecution (with one exception dealt with separately) found in the record or by the lower court.

In *American Federation of Labor* v. *Watson*, 327 U. S. 582 (1946) this Court ordered that the cause be remanded to the district court with directions to retain the bill pending determination of proceedings pending at the time in the Florida courts which might resolve the doubts sought to be determined in the Federal Court. In the instant case there is no state court action pending.

Douglas v. *City of Jeannette*, 319 U. S. 157 (1943), a Jehovah's Witness case, involved a municipal ordinance requiring a license before distributing pamphlets, and *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89 (1935), involved New York State's Code of Fair Competition in the Auto Industry. In the last-named case there was a disclaimer on

[9] "The majority of the Court are of opinion that in view of the *record and certain concessions made by counsel on the argument here any further hearing of the issue of irreparable injury to respondent from a threatened multiplicity of suits has been waived.*" (Emphasis supplied.)

the part of the District Attorney, as state prosecuting officer, of any intention of instituting more than a single prosecution.

Throughout these cases, this Court approved injunctions in the federal courts in cases of exceptional circumstances and a clear showing that an injunction is necessary to afford adequate protection of constitutional rights and of immediate danger of irreparable loss. We submit in the case at bar those tests have been squarely met. Loss, whether from enforced operation or from penalties, or multiplicity of suits, was undoubtedly imminent, to say nothing of mandamus proceedings, or even proceedings for contempt. The Attorney General of the State of Alabama is the law enforcement officer, and, indeed, the attorney for the Public Service Commission. Upon taking his oath of office he undoubtedly swore to uphold the law. "As long as there is an Attorney General in the State, the threat of prosecution is always present, and the injury, if any, resulting therefrom is always impending."[10] If therefore the laws of Alabama contemplated action by him to enforce the orders of the Commission a fair presumption is that he would do his duty.

But if it is thought that is not enough, we point here to the specific threat that the Commission would invoke sanctions of penalties because in its order of December 5, 1949, it specifically referred to penalties and made its position clear. Again the Commission was unwilling to grant appellee a hearing on its petitions until appellee had restored operation of the trains in question. Finally, appellee was notified by the State Commission that until appellee had purged itself of contempt it was optional with the Commission whether appellee would be heard on its original and supplemental petitions. One can hardly imagine a clearer case of imminent danger of irreparable injury and definite threat on the part of the state to invoke a multiplicity of suits for penalties and otherwise. The whole attitude of the

[10] *Atchison, Topeka and Santa Fe* v. *La Prade*, 2 F. Supp. 855.

State Commission throughout the handling of this case shows it was in no friendly mood toward appellee and that whatever step appellee took might be said to be taken at its risk of dire punishment at the hands of the state authorities.

Appellee could not dare to fail to comply with the State Commission's order and without taking affirmative action permit the heavy penalties to run against it day by day in the face of a well-reasoned decision of this Court. We refer to *Wadley Southern Ry.* v. *Georgia*, 235 U. S. 651 (1915). The railway there failed to comply with the order of the state commission. The state sued under its penalty statute and recovered judgment despite the railway's defense on constitutional grounds that the order was void. In affirming the penalty judgment against the railway this court said, at page 669:

> "If the Wadley Southern Railroad Company had availed itself of that right and—with reasonable promptness—had applied to the courts for a judicial review of the order, and if, on such hearing, it had been found to be void, no penalties could have been imposed for past or future violations. If in that proceeding, the order had been found to be valid, the carrier would thereafter have been subject to penalties for any subsequent violations of what had thus been judicially established to be a lawful order—though not so in respect of violations prior to such adjudication.
>
> "But, where, as here, after reasonable notice of the making of the order, the carrier failed to resort to the safe, adequate and available remedy by which it could test in the courts its validity, and preferred to make its defense by attacking the validity of the order when sued for the penalty, it is subject to the penalty when that defense, as here, proved to be unsuccessful."

That was a unanimous decision of this Court, and has never been overruled. In the face of this Court's decision in the *Wadley Southern case*, appellee Southern Railway

would have been reckless, to say the least, had it adopted the course appellants here contend it should have taken, that is, wait until sued for the penalties before taking steps to determine the validity of the State Commission's action in denying appellee's application to discontinue operation of these unprofitable passenger trains.

II.

Appellants' Contention that the Three-Judge United States District Court Had No Jurisdiction of This Cause Is Unsound and Without Merit.

We submit that the Court was properly convened, assumed jurisdiction, heard and determined this cause, under authority of 28 U. S. C., Sections 1331, 1332, 2281, and 2284.[11]

The amendment of 1913 to Section 266 of the Judicial Code, now Section 2281 of 28 U. S. C., added the clause "an order made by an Administrative Board or Commission acting under state statutes" but left the words "unconstitutionality of such statute" as written. The decision in *Oklahoma Gas Co.* v. *Russell*, 261 U. S. 290, 292 (1923), removed all doubt by placing an order of such Administrative board in the same status, so far as that section of the law is concerned, as any statute of a state.[12] Far from

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[11] Set out in Appendix A, page 34-35.

[12] "A doubt has been suggested whether these cases are within § 266 of the Judicial Code, Act of March 3, 1911, c. 231, 36 Stat. 1087, 1162; as amended by the Act of March 4, 1913, c. 160, 37 Stat. 1013. The section originally forbade interlocutory injunctions restraining the action of state officers in the enforcement or execution of any statute of a State, upon the ground of its unconstitutionality, without a hearing by three judges. The amendment inserted after the words 'enforcement or execution of such statute' the words 'or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State' but did not change the statement of the ground, which still reads 'the unconstitutionality of such statute.' So if the section is construed with narrow precision it may be argued that the unconstitutionality of the order is not enough. But this Court has assumed repeatedly that the section was to be taken more broadly. *Louisville & Nashville R. R. Co.* v. *Finn*, 235 U. S. 601, 604. *Phoenix Ry. Co.* v. *Geary*, 239 U. S. 277, 280, 281. *Cumberland Telephone & Telegraph Co.* v. *Louisiana Public Service Commission*, 260 U. S. 212. *Western & Atlantic R. R.* v. *Railroad Commission of Georgia*, *ante*, 264. The amendment seems to have been introduced to prevent any question that such

narrowing the meaning and effect of the section, the amendment was plainly intended to enlarge the law, so that where such an administrative order is attacked as unconstitutional the case is within the purview of the section. Section 2284 provides in considerable detail for the convening of the court and its functioning and includes a provision for notice to State officers when "the enforcement, operation or execution of State statutes or *State administrative orders*" is involved. *Oklahoma Natural Gas Co.* v. *Russell* has been cited with approval in numerous cases, among them:

United States v. *New York Central R. Co.*, 279 U. S. 73, 79 (1929).
King Manufacturing Co. v. *Augusta*, 277 U. S. 100 (1928).
Herkness v. *Irion*, 278 U. S. 92 (1928).
Ex Parte Williams, 277 U. S. 267 (1928).

This Court has entertained appeals from three-judge district courts without raising any question that they should have been tried before a single judge, for instance:

Mississippi R. R. Comm. v. *Mobile & Ohio R. Co.*, 244 U. S. 388 (1917).
Prendergast v. *New York Telephone Co.*, 262 U. S. 43 (1923).
Smith v. *Illinois Bell Telephone Co.*, 270 U. S. 587 (1926).[13]
Railroad & Warehouse Commission v. *Duluth Street Ry. Co.*, 273 U. S. 625 (1927).[13]
Public Utilities Commission v. *United Fuel Gas Co.*, 317 U. S. 456 (1943).

In each of the five cases just cited there was a direct attack upon a state commission's order.

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orders were within the section. It was superfluous as the original statute covered them. *Louisville & Nashville R. R. Co.* v. *Garrett*, 231 U. S. 298, 301, 318. *Atlantic Coast Line R. R. Co.* v. *Goldsboro*, 232 U. S. 548, 555. *Grand Trunk Western Ry. Co.* v. *Railroad Commission of Indiana*, 221 U. S. 400, 403. But it plainly was intended to enlarge not to restrict the law. We mention the matter simply to put doubts to rest."

[13] The record in this Court shows these were appeals from three-judge district Courts.

Three-judge courts have been convened and functioned as special United States district courts in many cases involving orders of state regulatory commissions, and most recently in respect of orders denying applications of railroads to discontinue unprofitable passenger trains. We submit citations thereto as Appendix D, page 41.

The late Chief Justice Hughes, delivering the unanimous decision of the Court in *Stratton* v. *St. Louis Southwestern Ry. Co.*, 282 U. S. 10 (1930), considered this very question, from which it appears that appellants' contention here is without merit, for, at page 15, the Court said:

> "* * * If an application for an interlocutory injunction is made and pressed to restrain the enforcement of a state statute, or of an administrative order made pursuant to a state statute, upon the ground that such enforcement would be in violation of the Federal Constitution, a single judge has no jurisdiction to entertain a motion to dismiss the bill on the merits. He is as much without power to dismiss the bill on the merits as he would be to grant either an interlocutory or a permanent injunction."

Appellants' argument points to three requirements which they say must be met before a three-judge court may be invoked under Section 2281: (a) an injunction must be sought; (b) it must be on the ground of the unconstitutionality of a state statute, and citing *Oklahoma Natural Gas Co.* v. *Russell*, interpreting "statute" to include "order"; and (c) the injunction must seek restraint of enforcement, operation, or execution of the statute or order whose constitutionality is attacked. The appellants' brief admits (a) and admits (b) to the extent that an order of the state commission was entered, but then argues that the averment in the bill in respect of the unconstitutionality of the statute was purely colorable, and stressed the fact that Southern's attorneys did not argue the point and the three-judge court did not pass upon it.

To that we recall that appellants filed their motion to stay the action in the district court upon the very ground

that the constitutionality of the state statute had been challenged and that the determination thereof should be by the state courts and not in a federal court (R. 48). But this is really a matter of no moment, for, undoubtedly the bill contained equity and invoked the protection of the Fourteenth Amendment to the Federal Constitution in a United States district court which was exercising jurisdiction through diversity of citizenship. Appellee railway has been asserting its constitutional rights in the premises from the filing of its original petition with the state commission, its supplemental petition, and the bill of complaint, and amendment thereto, in the district court. Examination of those pleadings will show beyond any question that appellee railway made it perfectly clear that it was seeking to preserve its constitutional rights. In the complaint before the district court, after alleging the order of December 5 was in violation of Fourteenth Amendment to the Federal Constitution, the complaint set out specific references to penalty statutes provided in the Alabama Code designed to force railroads to observe state commission orders and thus subjected appellee and its officers, agents, and employees, to the imposition of severe penalties and multiplicity of suits. The prayer was for an interlocutory and permanent injunction enjoining defendants "from proceeding against plaintiff (appellee here) its officers, agents, or employees, to enforce any penalties or other remedies provided under the laws of the State of Alabama on account of plaintiffs or their failure to restore the operation of said two passenger trains, * * *," and for a temporary restraining order in the same language.

Appellee, plaintiff below, amended its complaint by pleading the order of the state commission of January 9, 1950, wherein the original and supplemental petitions to discontinue these trains were denied. Therein appellee invoked the protection of the Fourteenth Amendment and the Commerce Clause of the Federal Consitution, and prayed for injunctive relief against defendants "from pro-

ceeding against the plaintiff, its officers, agents, or employees, to enforce any penalties or other remedies provided by the laws of the State of Alabama by reason of plaintiffs or their failure, or the failure of any of them, to restore the operation of said two passenger trains * * * as required by said order of defendant Alabama Public Service Commission of December 5, 1949, and as is inherent in said order of January 9, 1950."

The railway had filed its original and supplemental applications with the Commission (Docket 12221). Before they were heard the Commission entered a peremptory order on its citation (Docket 12225) commanding restoration of the trains as of the date of such order. It so issued its order despite the request of Southern's attorneys that if the Commission should decide to enter such an order, it be made effective after the date of the hearing on the original and supplemental petitions December 8.

In that situation, the State, on relation of its Public Service Commission, might have instituted mandamus proceedings against the Railway to compel compliance with its order of December 5 to restore the trains;[14] or might have invoked the penalties of the several Alabama statutes. Obviously the railway was confronted with mandamus proceedings or penalties to enforce compliance,—perhaps even with proceedings under Title 48 Alabama Code, § 78, as for contempt. The prayer of the complaint met such practical situation as clearly as it is possible to state it.

When the order of January 9 was issued, negative in form, but very positive and direct in effect, the protection the railway had to have, unless it complied by restoring the trains, was injunctive relief against action by the Commission, or the Attorney General, to enforce compliance by the penalties and sanctions provided in the Alabama statutes. The district court so construed the cause and prayers therein before it and, after denying defendants

[14] Alabama Public Service Com. v. Western Union Tel. Co., 208 Ala. 243, 94 So. 472 (1922); State v. Western Union Tel. Co., 208 Ala. 228, 94 So. 466.

motions, found confiscation in law and in fact, and thereupon granted a permanent injunction against defendants "from taking any steps or proceedings of any nature whatsoever against the plaintiff, its officers, agents, or employees, to enforce the provisions of said orders, or either of them, or to enforce any penalties or other remedies against the plaintiff, its officers, agents, or employees, on account of the failure to observe the provisions and requirements of said orders, or either of them, by discontinuing and not restoring the operation of plaintiff's local passenger trains 11 and 16 between Birmingham, Ala., and the Alabama-Mississippi state line."

We submit language could not be drawn any clearer than it was drawn in the complaints, prayers therein, and in the decree of the court, and completely answers appellants' contention that the relief prayed and granted is not within the purview of Title 28 U. S. C. Section 2281.

In support of their contention on this Point II in their argument appellants oddly enough cite *Phillips* v. *United States*, 312 U. S. 246 (1941). There, at page 251, it was said:

> "To bring this procedural device into play—to dislocate the normal operations of the system of lower federal courts and thereafter to come directly to this Court—requires a suit which seeks to interpose the Constitution against enforcement of a state policy, whether such policy is defined in a state constitution or in an ordinary statute or through the delegated legislation of an 'administrative board or commission.'"

In that case we find the state and the Federal Governments had joined hands in flood control and hydro-electric development. While the work was nearing completion the Governor of the state unsuccessfully pressed against the "Authority claims for the flooding of roads within the dam area", and, finally, to enforce his own views he declared martial law in the area and ordered the Adjutant General of

the state to occupy it. There was no state statute involved and there was no order of an administrative board or commission.

The court, at page 253, distinguished *Sterling* v. *Constantin*, 287 U. S. 378 (1932) thought to be in point by saying that in the *Sterling case* martial law was employed in support of an order of the Texas Railroad Commission. "The Governor was sought to be restrained as part of the main objective to enjoin 'the execution of an order made by an administrative . . . commission,' and as such was indubitably within § 266." (28 U. S. C. 2281). Thus the *Sterling case* squarely supports the injunctive relief Southern has sought in the case at bar by restraining the Attorney General from proceedings under the penalty statutes or otherwise to enforce the Commission's orders.

Appellants' reliance upon *Oklahoma Gas Co.* v. *Packing Co.*, 292 U. S. 386 (1934), is no more support for their position on this phase of their argument than the *Phillips case*, which we have discussed. In the *Oklahoma Gas case* it appears that a three-judge United States district court had been convened to hear a suit brought by Oklahoma Gas Company, and another public service company, against Wilson & Company, Incorporated (later Oklahoma Packing Company), a private business corporation, the State Corporation Commission, and the Attorney General, to enjoin an order of the Commission. The Commission's order had directed the Oklahoma Gas Company to supply Wilson & Company with gas at a prescribed rate assailed as an infringement of the due process and contract clauses of the Federal Constitution. The order was made upon petition of Wilson & Company to the state commission. The suit was against the State Corporation Commission to enjoin enforcement of an order affecting service and rates of the plaintiff Gas Company, and also against a private corporation which was the beneficiary of the state commission's order, and to restrain the latter from prosecuting an action to recover what it paid in excess. Before this Court the

case, we think, may fairly be said to have turned upon this statement at page 389:

> "* * * Upon the trial, the court below made its finding, not assailed here, that no penalties could be imposed for non-compliance with the challenged order, as it had been suspended by supersedeas in the proceedings to review it before the Supreme Court of Oklahoma, and while they were pending it had become inoperative by reason of the order of the Commission establishing the new rate."

Thereupon this Court, being without authority to entertain a direct appeal, vacated the decree below and remanded for further proceedings providing for a fresh order to save appellants their proper remedies as before the normal United States district court.

In the case at bar there has been no vacation of the orders of the Alabama Public Service Commission here complained of. The court below found, and as the record clearly shows, appellee railway was threatened with the sanction of penalties provided by the Alabama statutes. Certainly in the case at bar there is no case of a private litigant being involved in any way in the proceedings. The issue here is squarely between the state authorities, on the one hand, and appellee railway, on the other.

We have devoted more attention to this point appellants have made against the jurisdiction of the three-judge district court than it really needs because some misunderstanding seems to have grown out of the decision in *Ex Parte Bransford*, 310 U. S. 354 (1940). That was a suit by a national bank to enjoin collection of a state tax. The bank made no attack on a state statute but alleged that it had been misconstrued by state officials who, as a result thereof, had made an assessment alleged to have been unconstitutional. The defendants petitioned for a writ of mandamus to require the federal judge to convene a three-judge court. It was held in this Court that the hearing before a single

judge was proper. At page 361 of the decision, the following appears:

> "* * * It is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional. The latter petition does not require a three-judge court."

The cases cited, we submit, clarify the meaning of the decision in the *Bransford case* and show the error of appellants in the reliance they have placed upon it. Hence we now review the authorities cited in the *Bransford case*.

Stratton v. *St. Louis Southwestern Ry.*, 282 U. S. 10 (1930), in which the Court held it was necessary to convene a three-judge federal court to have a suit brought by the railway to restrain the enforcement of an Illinois tax statute upon the ground that the statute, *as applied to the complainant*, violated the commerce clause and the due process and equal protection clauses of the Federal Constitution. The Court clearly states in this case that where it is sought to enjoin the enforcement of a state statute or an administrative order made pursuant to a state statute upon the ground that such enforcement would be in violation of the Federal Constitution, a single judge has no jurisdiction.

Another case cited in *Ex Parte Bransford* is *Ex Parte Hobbs*, 280 U. S. 168 (1929), wherein a writ of mandamus was sought to require a district judge to call a three-judge court. The original plaintiff had sued to enjoin state officers from enforcing an order fixing its rates, and from revoking its license for failure to obey the same, alleging diversity of citizenship and that the order, and certain state statutes, if construed to sanction it, were violative of the due process clause of the Fourteenth Amendment. However, the plaintiff prosecuted his case only as a suit to enjoin the revocation of his license on the ground that such revoca-

tion would not be authorized by the state statutes, considering them as valid. The injunction was granted on the latter basis so there was held to be no reason to convene a three-judge court.

Ex Parte Williams, 277 U. S. 267 (1928) also cited in the *Bransford case*, involved a suit by a railroad to enjoin county treasurers from collecting taxes from the railroad based on assessments which the railroad contended were in violation of the equality clause of the Fourteenth Amendment. When the cause was ready for final hearing the defendants moved for a three-judge federal court and, upon the single judge's refusal to convene it, they petitioned for mandamus. This Court held that "a case does not fall within § 266 unless a statute or an order of an administrative board or commission is challenged as contrary to the Federal Constitution" citing *Oklahoma Gas Co.* v. *Russell*, 261 U. S. 290, and *Ex Parte Buder*, 271 U. S. 461, 465 (1926). The Court then pointed out that there was no question as to the validity of the taxing statute and "an assessment is not an order made by an administrative board or commission within the meaning of that section." The difference lies in the fact that the function of an assessing board is merely to assess, not to levy. Its function is informational. The distinction between that function and the function of regulating expressed in orders of a railroad or like commission was noted.

Ex Parte Collins, 277 U. S. 565 (1928), was cited in the *Bransford case* for the proposition that "even where the statute is attacked as unconstitutional," § 266 is inapplicable unless the action "complained of is directly attributable to the statute." Petitioner there had applied for a three-judge federal court in a case wherein he was seeking to enjoin municipal authorities and a contractor employed by the city from proceeding under a resolution of the city directing the paving of a street. The improvement was to be made pursuant to a state statute providing for assessment of the cost of improvements against abutting prop-

erty which petitioner claimed was unconstitutional in that it made no provision for giving the property owners a hearing. The Court held this suit did not fall within the purview of § 266 despite the attack on the constitutionality of a state statute since the petitioner sought to enjoin a municipality rather than the state. Section 266 was said to apply only where the object of the suit "is to restrain the enforcement of a statute of general application or the order of a state board or commission."

In view of the cases above which are the authorities cited in the *Bransford case* in support of the holding we have quoted, it appears that, despite the apparent misunderstanding of the wording of the *Bransford* opinion, that opinion does not go beyond holding that an assessment is not an administrative order and finding that an attack on an assessment is not an attack on the statute. Nothing in subsequent opinions which cite the *Bransford case* purports to extend its meaning beyond those limits.

Supreme Court cases since the *Bransford case* are the following.

Phillips v. *United States*, 312 U. S. 246 (1941), which we have already discussed.

Query v. *United States*, 316 U. S. 486 (1942), involved a suit to restrain the enforcement of a state sales tax on the purchase and sale of goods at Army Post Exchanges. It was contended that application of the state tax to Post Exchanges was an unconstitutional interference with an instrumentality of the federal government. Respondents denied that Post Exchanges were such instrumentalities and stated that no act of Congress giving consent to certain state taxation within federal areas was necessary since territorial immunity was removed by Public Act No. 819, 76th Congress.

Although the district court was in doubt, this Court held that this was a case for a three judge federal court, finding that this case involved more than the construction of a federal statute as in *Ex Parte Buder*, 271

U. S. 461, 466-467. This case was found to involve an effort to restrain the application of a state statute upon the ground "of the unconstitutionality of the threatened application." Not only was that the ground asserted by the complaints for the relief sought, but the relief awarded was based on that ground. This Court's opinion so found despite the district court's statement that only the meaning of the federal statute was involved.

Ex Parte Bransford was cited in this opinion for the proposition that where a substantial charge has been made that a state statute violates the Constitution, relief in the form of an injunction can be afforded only by a three-judge court pursuant to § 266.

The *Phillips case* was distinguished as a case in which the state officials threatened to engage in conduct which state law could not reasonably be construed to authorize.

This case clearly shows that a three-judge court is the proper forum for testing "the enforcement, operation, or execution" of a state administrative order upon the ground of the unconstitutionality of such order even though the statute otherwise is not unconstitutional. The analogy to the case at bar is very close in this respect.

Case v. *Bowles*, 327 U. S. 92 (1946) involved the application of the Emergency Price Control Act to a sale of state lands for the support of schools under provisions of a state law. It was held that since the preeminence of the federal law over the state was at issue, this was not a § 266 case. The complaint did not challenge the constitutionality of the state law; it merely alleged that its enforcement would violate the Emergency Price Control Act.

We submit in the case at bar that the three-judge district court undoubtedly had jurisdiction.

III.

Appellants' Contention That Federal Courts Should Abstain From Exercising Jurisdiction of Matters Properly Decided by State Courts Is Unsound and Without Merit.

The contention is made broadly and irrespective of whether the district court is a three-judge or a single-judge court. In our reply we take issue with the correctness of appellants' contention as applied to the case at bar.

We submit appellee railway has followed state procedure exactly, as far as it could safely follow state procedure. Having elected to file its complaint in the federal court, it did so in full compliance and in keeping with the statutes and decisions.

To begin with, appellee filed its petition with the state commission for authority to discontinue the trains and while their operation was suspended, under order of the Interstate Commerce Commission, filed a supplemental petition with the Alabama Commission for authority not to restore operation. Appellee does not here challenge the constitutionality of the requirement contained in Section 106, Title 48 Alabama Code of 1940, that such application must be made.

There is no provision in the Alabama law making a petition for reconsideration or rehearing before the state commission mandatory before a party at interest resorts to the courts. Hence no such petition was filed by appellee. *Prendergast* v. *New York Telephone Company*, 262 U. S. 43, 48 (1923).

The state's statutory review of its commission's orders in the state courts contemplates judicial as distinguished from administrative action. *Avery Freight Lines* v. *Persons*, 250 Ala. 40, 32 So. (2d) 886, 889 (1947).

Therefore our case had definitely passed from the administrative to the judicial stage in which appellee had the right of election whether to sue in federal or state courts. *Bacon* v. *Rutland Railroad Co.*, 232 U. S. 134 (1914).

In *Prentiss* v. *Atlantic Coast Line*, 211 U. S. 210 (1908) it was said at page 228:

> "* * * If the railroads were required to take no active steps until they could bring a writ of error from this court to the Supreme Court of Appeals (of Virginia) after a final judgment, they would come here with the facts already found against them. . . . All their constitutional rights, we repeat, depend upon what the facts are found to be. They are not to be forbidden to try those facts before a court of their own choosing if otherwise competent. 'A State cannot tie up a citizen of another State, having property within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts.' "[15]

R. R. Commission v. *Duluth St. Ry.*, 273 U. S 625 (1927), at page 628, it was said:

> "* * * Where as here a constitutional right is insisted on, we think it would be unjust to put the plaintiff to the chances of possibly reaching the desired result by an appeal to the State Court when at least it is possible that as we have said it would find itself too late if it afterwards went to the District Court of the United States.[16]

The charge of unconstitutionality, paragraph 4 of the bill, that no standards for the guidance of the Commission are prescribed for exercising its power under Section 106, is termed colorable by appellants pointing out that appellee did not argue the point in the court below. Nor did the Court rest its decision upon it. If, therefore, under appellants' view this constitutional issue was more apparent than real it may, we submit, be laid aside as mere surplusage. But that is not necessary because the Alabama Su-

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[15] Omitted authorities: *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U.S. 362, 391; *Smyth* v. *Ames*, 169 U.S. 466, 517; *McNeill* v. *Southern Railway Co.*, 202 U.S. 543; *Ex parte Young*, 209 U.S. 123, 165; *Chicago & N. W. Ry. Co.* v. *Dey*, 35 Fed. Rep. 866; *Northern Pacific Ry. Co.* v. *Keyes*, 91 Fed. Rep. 47; *Western Union Telegraph Co.* v. *Myatt*, 98 Fed. Rep. 335.

[16] Omitted authorities: *Pacific Telephone & Telegraph Co.* v. *Kuykendall*, 265 U.S. 196; *Oklahoma Natural Gas Co.* v. *Russell*, 261 U.S. 290.

preme Court has construed the statute and stated the guides to be observed in enforcing the statute. *Alabama Public Service Commission* v. *Atlantic Coast Line R. Co.*, 253 Ala. 559, 45 So. (2d) 449, 451 (1950).

From the foregoing it appears there is no constitutional question which appellants may properly say should be first decided by the state courts. There is nothing left, therefore, but the Alabama Commission's *application* of the state statute whereunder it exercised its power to deny appellee's petition. Thus we have a clear case of a *state statute applied* against which appellee claims the protection of due process under the Fourteenth Amendment to avoid confiscation of its property. It clearly follows that such application of the state statute in violation of the constitutional guarantees brings the case at bar squarely within the purview of Sections 2281 and 2284, Title 28 U. S. C., in keeping with the decision of this court in *Ex Parte Bransford*, 310 U. S. 354.

We have heretofore shown how utterly reckless it would have been for appellee to have waited indefinitely for suit against it to enforce penalties for noncompliance with the Commission's order. *Wadley Southern* v. *Georgia*, 235 U. S. 651. So that course was not open to us.

The statutory method of review provided in the Alabama law is the only method provided, Sections 17, 79, 81, 82, 84-89, Title 48 Alabama Code 1940. Appendix B. The hearing in the Circuit Court of Montgomery County is not de novo but must be confined to the record made before the Alabama Commission. There must necessarily be an interval of time between the issuance of the state commission's order and action by circuit court during which the record before the state commission is gathered together and filed with the court. Should appellee here have sought review in the circuit court it would have had no protection against the order of the Commission of December 5, 1949. It commanded appellee to restore the operation of the trains as of that date. Even if it had been possible to have filed the record

with the circuit court in a short time, that court could not have granted appellee any protection against action by state authorities to compel compliance or enforce penalties in the interim. We say that advisedly, despite the argument of appellants that there is provision in state law for the circuit judge to grant a supersedeas. The provision for bond and supersedeas is not applicable to the case at bar. We submit that is clearly apparent from reading the several sections of the law which we have printed in the appendix hereto. The provision for supersedeas contained in the law in respect of rate cases is not applicable here. By no stretch of the imagination can that provision for supersedeas specifically provided for rate cases be taken to afford protection to appellee here against the accrual of the penalties or enforcement of other remedies which the state might invoke against it to compel compliance with the commission's orders of December 5, 1949, or January 9, 1950.

We stress the fact that appellee was here confronted with imminent danger of irreparable injury and multiplicity of suits and properly invoked the jurisdiction of the federal court in a case wherein diversity of citizenship existed and the jurisdictional amount was met. Here was undoubtedly a special case and one in which the federal court wisely exercised its discretion in assuming jurisdiction and granting the relief prayed.

The Congress has prescribed the jurisdiction of United States district courts and from time to time has changed it and limited it, notably in respect of state tax matters and state commission rate orders. 28 U. S. C. Sections 1341, 1342. While not limiting jurisdiction, the Congress provided for those instances in which a federal court should stay its hand by the amendment of March 4, 1913, now the last paragraph of Section 2284. The amendment provided for a stay by "any court of the United States." As amended by the Act of June 25, 1948, the requirement is that "a District court of three judges" shall, before final hearing, stay action, etc., in order to permit of deter-

mination in the state courts. But such a stay is only to be granted when it appears that there is a pending proceeding in the state court and in which the state court has stayed proceedings under the statute or order pending its determination. In the case at bar it does not appear that any such state court action was pending.

The order of the Interstate Commerce Commission, under which the trains were suspended, was lifted, effective November 21, 1949. The complaint was filed December 6, 1949. The hearing before the three-judge district court was on January 12, 1950. The final decree was issued February 13, 1950. The state authorities took no action in the state courts for enforcement of the Commission's order. It must follow that having failed to avail of the opportunity given under the federal statute to litigate the issues in the state courts and to avoid any possible conflict between federal and state procedures, the appellants should not now be heard to challenge the wise discretion of the district court in going forward with the case and rendering its final decree therein on February 13, 1950.

We now examine the authorities appellants cite in support of Point III.

Stainback v. *Mo Hock Ke Lok Po*, 336 U. S. 368 (1949). The complaint called for broad consideration of the application of an act of the Territory of Hawaii to foreign language schools, which act had not been construed by the Hawaiian courts. This was not a statute of a state.

Railroad Com. of Texas v. *Pullman Co.*, 312 U. S. 496 (1941). State Railroad Commission required a Pullman conductor though only one Pullman car attached to a train; the colored porter not enough. The question was whether the state statute gave the Commission appropriate power. No multiplicity of suits or imminent danger of irreparable damage existed, such as confronted appellee in the case at bar.

Meredith v. *Winter Haven*, 320 U. S. 228 (1943). Invoking jurisdiction solely on diversity of citizenship, Meredith and others, as owners of city's bonds, sued in the

federal district court to enjoin the city from calling the bonds without providing for payment of deferred interest coupons. The question presented to this Court was whether the circuit court of appeals, on appeal from the judgment of the district court, rightly declined to exercise its jurisdiction on the ground that decision of the case turned on questions of Florida constitutional and statutory law which the decisions of the Florida courts had left in a state of uncertainty. Reversing the court of appeals this Court said at page 234:

> "The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts. In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment.[17] When such exceptional circumstances are not present, denial of that opportunity by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act."

Phillips v. *United States*, 312 U. S. 246 (1941). We have discussed under appellants' Point II. It no more supports appellants Point III than *Meredith* v. *City of Winter Haven*, just referred to.

Burford v. *Sun Oil Co.*, 319 U. S. 315 (1943). The injunctive relief sought in the federal district court involved the comprehensive general regulatory system de-

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[17] Omitted authorities: *Commonwealth Trust Co.* v. *Bradford*, 297 U. S. 613, 618; *Risty* v. *Chicago, R. I. & P. Ry. Co.*, 270 U. S. 378, 387; *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 234-235; *McClellan* v. *Carland*, 217 U. S. 268, 281-282.

signed by Texas for conservation of oil and gas in one of the largest fields and as the Court said: "* * * as thorny a problem as has challenged the ingenuity and wisdom of legislatures" (p. 318). We pause to say there is nothing like that in the case at bar. And there is this further and all-important difference, for this Court pointed out at page 326:

> "* * * the orders of the Commission are tested for 'reasonableness' by trial de novo before the court, *Railroad Commission* v. *Shell Oil Co.*, 139 Tex. 66, 76-80, 161 S. W. 2d 1022, and the court may on occasion make a careful analysis of all the facts of the case in reversing a Commission order. *Railroad Commission* v. *Gulf Production Co.*, 134 Tex. 122, 132 S. W. 2d 254. The court has fully as much power as the Commission to determine particular cases, since after trial de novo it can either restrain the leaseholder from proceeding to drill, or, if the case is appropriate, can restrain the Commission from interfering with the leaseholder. The court may even formulate new standards for the Commission's administrative practice and suggest that the Commission adopt them."

We stress the fact that the state courts' review of the Texas Commission's order under the Texas statutes is broader than in Alabama. Besides, appellants are not on sound ground in trying to set up a similarity of state wide policy as between the complexities of the Texas oil and gas conservation program and the Alabama statute requiring railroads (§ 106) and utilities generally (§ 35) to secure authority from its Public Service Commission before discontinuing operations. There is nothing novel about such a statutory requirement. Practically every state in this country has them and they are about as old as the state regulatory commissions themselves. Appellants' reference to other similar cases in the same district court following the case at bar, adds nothing to support appellants' argument—just the contrary. For the fact that this appellee, the Atlantic Coast Line R. R., and Louisville & Nashville

R. R. have all had to seek relief from the Alabama Commission's orders goes to show that the only policy the State has, based on these orders of the Commission, is to flatly deny all efforts of rail lines operating in Alabama to discontinue unprofitable passenger trains for which there is no public need and thus conserve their operations in the public interest—a duty they owe to themselves and to the public.

The judges who comprised the three-judge district courts in No. 146 and No. 395 are outstanding Alabama lawyers. They must know the Alabama statutes for review of State Commission's orders. Indeed, Honorable Leon McCord, Judge of the Court of Appeals of the Fifth Circuit, who sat in both cases, was formerly the judge of the Circuit Court of Montgomery County, Alabama.[18] That court has exclusive jurisdiction to review orders of the Alabama Public Service Commission. Section 79, Title 48, Alabama Code.

CONCLUSION.

We submit that the three points appellants have made in presenting their appeal to this Court are without merit and the arguments undertaken to be made in their support are unsound. In addition, we submit there is one very important point that we stress in concluding our argument: The points appellants have made present procedural questions; not one of them goes to the merits. We say this is all important because the appeal on the three procedural grounds argued in effect necessarily admits the fundamental error of defendant Commission in denying appellee's application to discontinue operation of the trains in question. To prevail on the procedural points made on this appeal would in no sense be a justification of defendant Commission's denial of appellee's application. The appeal, as here taken, is a confession of error on the part of the Alabama Public Service Commission. The three-judge district court prop-

[18] *Alabama Public Service Commission v. West Union Telegraph Co.*, 208 Ala. 522, 94 So. 472 (1922).

erly exercised a sound discretion in assuming jurisdiction, hearing the cause and entering its final decree therein. We submit the decree should be affirmed by this court.

Respectfully submitted,

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APPENDIX A.

Title 28 United States Code.

§ 1253. *Direct appeals from decisions of three-judge courts.*—Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

§ 1331. *Federal question; amount in controversy.*—The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

§ 1332. *Diversity of citizenship; amount in controversy.*—(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:

(1) Citizens of different States; . . .

§ 2281. *Injunction against enforcement of State statute; three-judge court required.*—An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

§ 2283. *Stay of State court proceedings.*—A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

§ 2284. *Three-judge district court; composition; procedure.*—(5) * * * A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State.

APPENDIX B.

Code of Alabama 1940—Title 48.

§ 17. (9813) *Exclusive powers and jurisdiction of commission.*—The rights, powers, authority, jurisdiction and duties by this title, conferred upon the commission shall be exclusive and in respect of rates and service regulations and equipment, shall be exercised notwithstanding any rights heretofore acquired by the public under any franchise, contract or agreement between any utility and municipality, county or municipal subdivision of the state, and shall be exercised, so far as they may be exercised consistently with the constitution of the state and of the United States, notwithstanding any right heretofore so acquired by any such utility.

§ 79. (9831) (9832) *Appeals from orders of commission.*—From any final action or order of the commission in the exercise of the jurisdiction, power, and authority conferred upon it by this title, an appeal therefrom shall lie to the circuit court of Montgomery County, sitting in equity, except appeals under chapter three of this title, and thence to the supreme court of Alabama. All appeals shall be taken within thirty days from the date of such action or order and shall be granted as a matter of right and be deemed perfected by filing with public service commission a bond for security of cost of said appeal when the appellant is a utility or person, and by filing notice of an appeal when the appellant is the State of Alabama.

§ 81. *Right to supersede order.*—On any such appeal any utility, interested party, or intervenor may supersede any decree rendered by giving such supersedeas bond or bonds as may be appropriate to the proceedings as provided for herein for superseding an order or orders of the commission.

§ 82. *Proceedings on appeal.*—The commission's order shall be taken as prima facie just and reasonable. No new or additional evidence may be introduced in the circuit court except as to fraud or misconduct of some person engaged in the administration of this title and affecting the order, ruling or award appealed from, but the court shall otherwise hear the case upon the certified record and shall set aside the order if the court finds that: the commission erred to the prejudice of appellant's substantial rights in its application of the law; or, the order, decision or award was procured by fraud or was based upon a finding of facts contrary to the substantial weight of the evidence. Provided, however, the court may, instead of setting aside the order, remand the case to the commission for further proceedings in conformity with the direction of the court. The court may, in advance of judgment and upon a sufficient showing, remand the cause to the commission for the purpose of taking additional testimony or other proceedings.

§ 84. (9838) *Appeal does not supersede order; supersedeas bond.*—No appeal shall stay or supersede the order or action appealed from unless the appellate court or judge thereof, upon hearing and notice, after consideration of the testimony, taken before the commission, shall so direct. If the appeal be from an order of the commission reducing or refusing to increase such rates, fares or charges, or any of them, or any schedule, or part or parts of any schedule of such rates, fares or charges, the appellate court, or judge thereof, shall not so direct or order a supersedeas or stay of the action or order appealed from without requiring as a condition precedent to the granting of said supersedeas that the utility applying for the same shall execute and file with the clerk of said court a bond, which bond shall be as hereinafter provided:

§ 85. (9839) *Oath of utility as to approximate amount of revenue.*—In the application for said supersedeas the utility shall, under oath, state the estimated approximate amount by which its revenues will be increased or reduced as the case may be, in six months, by reason of the increased rate sought by it or the reduced rate complained of.

§ 86. (9840) *Penalty and condition of bond.*—The bond required by the two preceding sections shall be double the sum so estimated with two or more sureties, one of which may be a surety company, to be approved by the judge, payable to the State of Alabama and conditioned to pay all such loss or damage as any person, firm or corporation may sustain, including all such excess rates, fares or charges, as such person, firm or corporation may have paid pending said appeal or any subsequent appeal to the supreme court in the event the order or action of the public service commission shall be sustained.

§ 87. (9841) *Additional bond.*—An additional bond of like amount and with the same conditions shall be given at the end of each six months, pending the appeal and pending any subsequent appeal by either party to the supreme court.

§ 88. (9842) *Effect of supersedeas bond.*—From the time said bond shall have been given the order appealed from shall be stayed and superseded and it shall be lawful for the utility to charge the rates, fares, or charges which had been reduced by said order, or the rates, fares or charges sought to be established by its petition, until the final disposition of said cause. If said utility shall fail after thirty days' written notice to give such additional bond at the end of each six months, pending said appeal, and pending any subsequent appeal to the supreme court, the stay or supersedeas shall terminate, and the rates, fares, or charges established by statute or by the public service commission or by the order or action appealed from, shall be revived and shall be the lawful rates pending all further proceedings in the cause.

§ 89. (9690) (5698). *Suspension of rates shall only affect companies giving required bonds.*—If any rate or rates or order or orders shall under the provisions of this chapter be suspended by the giving of any of the bonds provided for herein, the suspension shall be operative as to and shall affect only the utilities complaining and giving such bond.

§ 106. (9713) *Permit to abandon service.*—No transportation company subject to this chapter shall abandon all or any portion of its service to the public or the operation of any of its lines, properties, or plant which would affect the service it is rendering the public, except ordinary discontinuances of service for nonpayment of charges, nonuser, violations of rules and regulations or similar reasons in the usual course of business, unless and until there shall first have been filed an application for a permit to abandon service and obtained from the commission a permit allowing such abandonment.

APPENDIX C.

Chronological History of the Case.

September 13, 1948: Southern Railway filed its petition with the Alabama Public Service Commission for authority to discontinue passenger trains Nos. 11 and 16—Docket No. 12221 (Exhibit 1 to the complaint, R. 19-20).

October 26, 1949: Southern Railway discontinued trains Nos. 11 and 16 in compliance with Interstate Commerce Commission Service Order No. 843, dated October 21, 1949 (Exhibit 2 to complaint, R. 19-20).

October 26, 1949: Alabama Public Service Commission notified Southern Railway that it is expecting that each and every train which might have been removed in compliance with the I. C. C. order will be restored to service within twenty-four hours after the I. C. C. order might be rescinded (Exhibit 4 to complaint, R. 4, 26).

November 10, 1949: Southern Railway filed supplemental petition with Alabama Public Service Commission for authority not to restore operation of trains Nos. 11 and 16 (Exhibit 3 to complaint, R. 21-23).

November 18, 1949: Southern Railway advised Alabama Public Service Commission that trains 1 and 2, 7 and 8, and 15 and 16, which had been discontinued under I. C. C. Service Order No. 843, would be restored November 21, 1949.

Southern Railway attorneys so advised Alabama Public Service Commission by telephone and telegraph, and asked for a hearing on Southern's supplemental petition.

The President of the Alabama Public Service Commission advised Southern Railway's attorneys that a hearing had been set for Fayette, Ala., on December 8, 1949, but would not be held unless trains 11 and 16 were restored (Paragraph 9 of complaint admitted by paragraph 9 Commission's answer).

November 21, 1949: Interstate Commerce Commission Service Order No. 843 vacated by Service Order No. 843-A dated November 14, 1949 (Exhibit 5 to complaint, R. 26-27).

November 22, 1949: By exchange of telegrams Alabama Commission asked whether trains 11 and 16 would be restored. Southern replied "no" insisting on hearing on its supplemental petition. (Exhibit 6, R. 28-29.)

November 22, 1949: Alabama Commission issued its citation, Docket 12225, for Southern Railway to show cause before it why the Commission should not enter an order specifying the Railway's refusal to restore operation in violation of the Alabama Code, Title 48, and requiring that such violation be discontinued (Exhibit 7 to complaint, R. 31-32).

November 25, 1949: Southern Railway appeared before the Commission in response to citation, Docket 12225 (Exhibit 7 to complaint). The Commission refused to receive evidence offered by Southern, to which Southern excepted, and asked if order to restore trains should be entered that it be made effective after the hearing set for December 8 at Fayette, Ala. (Paragraph 12 of complaint, R. 6, R. 7).

December 5, 1949: Alabama Commission entered its order in Docket 12225 commanding Southern to restore operation, referring to penalties for failure to comply, and further providing that unless Southern purged itself of the alleged contempt it would be optional whether the Commission would hear its original and supplemental petitions, then set for Fayette, December 8 (Exhibit 8 to complaint, R. 33-37).

December 6, 1949: Southern Railway filed its bill in United States District Court at Montgomery (R. 1-13).

December 6, 1949: District Court entered its order temporarily restraining the Commission and state authorities from compelling the Railway to restore the operation of the trains (R. 40-42).

December 8, 1949: Original and supplemental petitions, Docket 12221, heard before Alabama Public Service Commission at Fayette, Ala. (R. 55).

December 14, 1949: Alabama Commission, et al., defendants, filed their motion to dismiss (R. 43-45).

January 4, 1950: Interstate Commerce Commission entered its Service Order No. 845, effective January 5, 1950, again directing the railroads to curtail their coal-burning passenger locomotive miles by 33-1/3 per cent, to expire March 8, 1950 (recited in Commission's order, R. 57).

January 9, 1950: The Alabama Commission entered its report and order in Docket 12221 Railway's original and supplemental petitions, heard Fayette, December 8, 1949, wherein the Commission denied authority requested to discontinue trains 11 and 16 (Exhibit A to defendants' answer, R. 55-63).

January 12, 1950: Southern Railway amended its complaint (R. 46-47).

January 12, 1950: Commission, et al., defendants, amended their motion to dismiss (R. 47-48).

January 12, 1950: Commission, et al., defendants, filed their motion to stay action (R. 48-49).

January 12, 1950: Defendant Commission, et al., filed their answer (R. 49-54).

January 12, 1950: Cause heard before three-judge District Court as Montgomery.

February 8, 1950: Statutory District Court filed its opinion (R. 63-69).

February 13, 1950: Statutory District Court entered its final decree vacating defendant Commission's orders of December 5, 1949, and January 9, 1950, and enjoining defendants from taking steps to enforce said orders by penalties or otherwise (R. 69-70).

April 12, 1950: District Court entered order allowing appeal (R. 70-71).

October 9, 1950: This Court noted probable jurisdiction (R. 73).

APPENDIX D.

List of Authorities Referred to on Pages 9 and 15.

Northern Pacific R. Co. v. *Board of R. R. Commissioners,* D. Mont., 28 F. Supp. 810 (1939).

Northern Pacific R. Co. v. *Board of R. R. Commissioners,* D. Mont., 46 F. Supp. 340 (1942).

New York Central R. Co. v. *Illinois Commerce Commission,* N.D. Ill., 77 F. Supp. 520 (1948).

Chicago, B. & Q. R. Co. v. *Board of R. R. Commissioners,* D. Mont., 78 F. Supp. 1010 (1947).

Southern Railway Co. v. *South Carolina Public Service Commission,* E.D. S.C., 31 F. Supp. 707 (1940).

Atlantic Coast Line R. Co. v. *Public Service Commission,* E.D. S.C., 77 F. Supp. 675 (1948).

Chicago, B. & Q. R. Co. v. *Illinois Commerce Commission,* N.D. Ill., 82 F. Supp. 368 (1949).

Southern Railway Co. v. *Alabama Public Service Commission,* M.D. Ala., 88 F. Supp. 441 (1950).

Southern Railway Co. v. *Alabama Public Service Commission,* M.D. Ala., 91 F. Supp. 980 (1950).

Atlantic Coast Line R. Co. v. *Alabama Public Service Commission,* M.D. Ala., 92 F. Supp. 579 (1950).

The Ann Arbor Railroad Co. v. *Michigan Public Service Commission,* E.D. Mich., 91 F. Supp. 668 (1950).

Louisville & Nashville R. Co. v. *Alabama Public Service Commission,* M.D. Ala., 93 F. Supp. 544 (1950).